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No. 88-331

In The
# Supreme Court of the United States
October Term, 1988

MICHAEL LANE, MICHAEL O'LEARY, and
RICHARD W. DeROBERTIS,

*Petitioners,*

v.

JAMES DAVENPORT, CHARLES RICHMOND,
HECTOR RIVERA, CARL LUCAS,
ROGER PENNIE, CHARLES TERRY,
and MARK McBRIDE,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals properly accepted, for purposes of this case only, petitioners' concession that cruel and unusual punishment was a question of fact, where petitioners had consistently argued that cruel and unusual punishment was a question of fact and where petitioners' sole argument on appeal was that the district court's findings of fact were clearly erroneous.

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## BRIEF IN OPPOSITION

## OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1-13) is reported at 844 F.2d 1310 (7th Cir. 1988).

## JURISDICTION

The judgment of the court of appeals was entered on April 13, 1988 and modified on rehearing on May 23, 1988. The petition for certiorari was apparently filed on August 22, 1988 and received by respondents on or about August 24, 1988. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

See Petition for Certiorari at 2.

## STATEMENT OF THE CASE

1. Respondents filed this class action on behalf of a class of prisoners confined in the solitary confinement ("segregation") unit of the Stateville Correctional Center in Joliet, Illinois for more than 90 consecutive days. The complaint charged that the living conditions in the unit for these inmates were so substandard as to constitute cruel and unusual punishment, violative of the Eighth Amendment of the United States Constitution. Plaintiffs sought damages individually and equitable relief on behalf of the class. The legal and equitable issues were tried to a jury for two weeks in September, 1986.

2. The case centered on Stateville's shower and exercise rules. Stateville permitted segregation inmates only

one hour of out-of-cell exercise per week and one shower per week. Every federal penitentiary, and every American prison known to the expert witnesses who testified at trial, allows segregation inmates to exercise outside their cells substantially more often. Plaintiffs presented evidence that in the totality of the circumstances Stateville's exercise and shower restrictions were severe, unusual, psychologically harmful, and physically harmful to inmates confined more than 90 consecutive days.

a. Plaintiffs testified as to the regimen in the Stateville segregation unit. Inmates were locked in their cells virtually 24 hours a day, seven days a week. Their only regular relief from this isolation was a one-hour exercise period in a fenced outdoor yard once a week, and a ten-minute shower once a week. Tr. 3, 8, 19, 569-570.[1] Inmates occasionally were allowed out of their cells to see visitors, work in a cage in the law library, go to an administrative hearing, or go to the hospital. Tr. 16. All told, segregation inmates spent a maximum of two or three hours per week outside their cells. Tr. 38. Some of the named plaintiffs spent two and a half to three years in solitary confinement.

b. Dr. Ronald Shansky, who was Medical Director of the Illinois Department of Corrections at the time of trial, testified that, in his opinion, permitting inmates only one shower and one hour of exercise per week was "not a medically acceptable frequency or duration of exercise or showers and promote[d] deterioration of the mental and physical status of residents within the unit." Plaintiffs'

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[1] "Tr." refers to the trial transcript.

Exhibit 3, pages 21-22; Tr. 742-785. He opined that one hour per week of exercise was "insufficient to maintain a healthful status" (Tr. 753), and that the probable results of the exercise policy included "deterioration of the heart," "hardening of the arteries," "muscle atrophy, joint stiffness, and bone demineralization." Tr. 753. Dr. Shansky also testified that lack of exercise and "lack of social contact" in solitary confinement can cause some prisoners to "become depressed," while "others may become more angry and hostile, as a result." Tr. 754-55. In addition, Dr. Shansky testified that in his experience as Medical Director of the Illinois Department of Corrections, "lack of exercise will increase the demand for medical services"; he considered this correlation "well documented." Tr. 754.

c. Plaintiffs introduced the American Correctional Association's *Standards for Adult Correctional Institutions* which require, as "essential" standards, that segregation inmates "have the opportunity to shave and shower at least three times per week," and that "inmates in segregation receive a minimum of one hour per day, five days per week, of exercise outside their cells." Plaintiffs also presented the American Medical Association's *Standards For Health Services In Prisons* which require that "each inmate [be] allowed a daily minimum of one hour of exercise involving *large muscle activity*, away from the cell." In addition, plaintiffs presented a 1976 report of a court-appointed panel of medical experts, which had condemned a similar exercise and shower policy then employed by the Menard Correctional Center in Illinois. (The practice was changed pursuant to court order.) The report stated in pertinent part:

> Residents of segregation are permitted one shower and one hour of exercise per week in a small exercise yard. In the view of the panel, this is not a medically acceptable frequency or duration of exercise or showers and promotes deterioration of the mental and physical status of residents within the unit. Apparently the exercise and shower provisions are not based on any known correctional standard but simply reflect a shortage of correctional officers to provide supervision of the residents.

Plaintiffs' Exhibit 3, pages 21-22.

d. Dr. Sean McConville, a professor of criminal justice at the University of Illinois specializing in penology, testified that excessive isolation in solitary confinement is known to be psychologically dangerous. In the early 1800's, the first experiments with solitary confinement in the United States "had to be abandoned after a few years because of the incidence of insanity. People could not take it." Tr. 852. Solitary confinement in British prisons also had to be abandoned "because a great number of people became insane." Tr. 853. Current academic literature reached similar conclusions. For example, one article upon which Dr. McConville relied concluded that "it is clear that the use of solitary confinement carries major psychiatric risks." Tr. 861, quoting Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1454 (1983).

Dr. McConville further testified that penologists and prison officials found regular out-of-cell exercise to be "one of the most central means of mitigating" the adverse effects of prolonged isolation and idleness. Tr. 848. For this reason, the general practice in maximum security pris-

ons in western countries is to permit prisoners to exercise outside their cells five to seven hours a week. Tr. 848-49; 855-57. In the United States, all federal penitentiaries allow inmates in segregation to exercise outside their cells five hours a week. Tr. 855. Dr. McConville was not aware of *any* prison that limited segregation inmates to only one hour per week of exercise, except for Stateville Correctional Center. Tr. 857.

Dr. McConville opined that prisoners in the Stateville segregation unit were not receiving adequate exercise opportunities. Tr. 877-918. Professor McConville also said that subjecting segregation inmates to excessive isolation and idleness creates "dangers of affecting people's health, their mental stability, and dangers of turning them into . . . people who instead of being deterred from crime or encouraged away from crime, bear a hardened—a reinforced sense of grievance against society." Tr. 845.

e. Dr. Jay Harness, an expert witness for defendants, admitted on cross-examination that out of the dozens of prisons he had visited in his career as a prison health care administrator, none except Stateville restricted inmates to only one hour of out-of-cell exercise per week. Tr. 1038-39. Dr. Harness also testified that "the minimum [exercise] standard," which "is well documented in the medical literature," is "aerobic exercise . . . in large muscle groups . . . half an hour five out of seven days." Tr. 1035.

f. Gilberto Romero, the Superintendent of the Stateville Segregation Unit, testified that yard space and security procedures were adequate (Tr. 655), and that he could, if ordered to do so, safely provide exercise for each segregation inmate five days a week. Tr. 662.

g. Dr. Harry Shuman, the medical director of Stateville at the time of trial, testified that inmates in the Stateville segregation unit consumed an average of 25% more medical services per person than inmates in the general population in Stateville, and that "in some months it has been much higher than that." Tr. 1081-82.

h. Stateville medical records confirmed the relatively poor health of the segregation inmates. Although segregation inmates comprised only about 10% of the total prison population in Stateville, they consistently needed a much higher percentage of physician assistant visits (generally, between 15 and 30 percent). Tr. 1055-58.[2]

i. Dr. Terry Brelje, a clinical psychologist (Tr. 1099) who testified for defendants, admitted that psychologists have found correlations between "prolonged isolation" and such serious psychological problems as people "imagin[ing] things happening that weren't happening" (Tr. 1127), "[m]assive free-floating anxiety" (Tr. 1127), "[h]yperresponsivity to external stimuli" (Tr. 1128), "[p]erceptual distortions, hallucinations" (Tr. 1128) and the "emergence of primitive ego—d[y]stonic fantasies." Tr. 1128.

j. Plaintiffs' testimony was consistent with the experts' predictions. Roger Pennie testified that while in segregation he "was breaking out in body rashes" (Tr.

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[2] Segregation inmates who have medical complaints are first seen by a certified medical technician. Tr. 1053. If the medical technician finds there is a problem and is unable to treat the problem himself, the inmate is referred to a physician's assistant. Tr. 1054.

50) and "suffering from severe headaches" (Tr. 53), although he had not had either problem before going to segregation. Tr. 54. James Davenport testified that while in segregation he developed rashes (Tr. 124) and his head hurt "all the time." Tr. 126. Hector Rivera testified that while in segregation he developed rashes on his chest and back. Tr. 217. Charles Terry testified that while he was in segregation he started developing sores on his back, legs, groin area and feet. Tr. 288. Mark McBride developed a rash while in segregation (Tr. 339) and Carl Lucas developed a rash and chest pains. Tr. 382.

The plaintiffs also complained about psychological and sleep disorders. Roger Pennie, who had been sent to prison for fraudulent use of a credit card (Tr. 34), testified that while in segregation he began to think "everybody was against me, my family in particular and they wasn't . . . and I threatened people, I called them all kinds of names." Tr. 55. At night Pennie barely slept at all (Tr. 56); instead, he thought about hurting his family and "[g]etting even." Tr. 57. Pennie further testified that while in segregation, "I noticed I had gotten violent . . . I was always thinking somebody wanted to do something to me and I was contemplating being able to do something to them first, when nobody wanted to do nothing to me." Tr.59.

James Davenport testified that while in segregation, "I wanted to hurt myself . . . maybe kill myself," although he had not had suicidal thoughts before. Tr. 126. He also had "dreams of people killing me and things, you know, being hurt by others, that is whenever I went to sleep." Tr. 128. Hector Rivera testified that while

in segregation "I used to, you know, dream about falling down the stairs, I used to dream about snakes coming to get me on top of the bed." Tr. 224. Around the fourth month in segregation Rivera began to think about "hanging myself." Tr. 226. Carl Lucas testified that while in segregation he had dreams of being beaten and stabbed (Tr. 386-7) and Charles Richmond testified that while in segregation he began to have violent fantasies. Tr. 435.

Mark McBride, who went into segregation in apparently good mental health (Tr. 336), testified that during his first six months in segregation "I was having bad dreams that would wake me up at night." Tr. 339. McBride testified that after eight months in segregation "I started hearing voices" (Tr. 342) which McBride thought came from "a transmitter or microphone in one of the fillings in my mouth." Tr. 342. McBride said the voices were "threatening me I shouldn't go outside, that there were deaths in my family." Tr. 343. The voices continued "[a]t all times of the day." Tr. 344. Although McBride was confined alone, he testified that once "when I woke up it was dark and there was a lady in my cell. She had a hair net on and maybe a stocking cap." Tr. 345. McBride said that another time the voices "told me to let me kill Richmond" (Tr. 346), another inmate.

McBride also testified that "on one occasion with the threatening of the voices I was afraid, I yelled out the window for help" (Tr. 354) and "I started to set some papers on fire to get the polices' attention." Tr. 354. McBride said that he did not set the fire but somebody else in his cell did (Tr. 354), although he was confined

alone in his cell. McBride further testified that the voices "told me to commit suicide" and "to do some gross things like eat my waste." Tr. 360. After 18 months in the Stateville segregation unit McBride was transferred to the Psychiatric Unit in Menard. Tr. 358, 104.

Plaintiffs also described abnormal behavior by the other inmates. Roger Pennie testified that he saw an inmate who set fire to his mattress, lying "upon his mattress and it was on fire." Tr. 61. Another time he saw an inmate try to hang himself with a blanket. Tr. 63. Hector Rivera testified that he saw inmates break windows and set fires in their cells. Tr. 231-32. On one occasion, he saw officers go into a cell and "they brung out the guy and he was unconscious and they handcuffed him and they just dragged him and took him downstairs." Tr. 231. James Davenport testified that he once saw a young man "burn himself up." Tr. 146. Another time he saw McBride pile up paper in a corner of the cell, set it on fire and while "playing in the fire, said he was going to kill himself." Tr. 147. On another occasion, Davenport saw "a young man put a rope about his neck that he had made and he jumped off his stool." Tr. 148. Carl Lucas recalled that there were fires in the cells every week. Tr. 390. Davenport said that he had "seen a lot of them [segregation inmates] make suicide attempts by cutting their wrists." Tr. 149. Davenport testified that altogether he had witnessed "maybe about 20 or 30 or more" suicide attempts while he was in segregation. Tr. 148.

3. After a two-week trial, the jury returned a verdict in favor of all plaintiffs, and awarded compensatory

and punitive damages against all defendants. In answer to special interrogatories, the jury found that:

(1) Under the totality of the circumstances, the defendants' practice of allowing inmates in solitary confinement only one shower per week constitutes cruel and unusual punishment.

(2) Under the totality of the circumstances, the defendants' practice of allowing inmates in solitary confinement only one hour of out-of-cell exercise per week constitutes cruel and unusual punishment.

(3) Each defendant was personally responsible for the imposition of cruel and unusual punishment.

(4) Each defendant acted with deliberate indifference or reckless disregard for the health and well-being or constitutional rights of each named plaintiff.

(5) Each named plaintiff sustained injury or damages.

(6) Each defendant's conduct was the proximate cause of each named plaintiff's injury or damage.

(7) There exists a pattern or custom of the defendants which has resulted in the denial of plaintiffs' rights to be free from cruel and unusual punishment. Tr. 1362-1366.

4. After trial, both sides declined Judge Hart's offer to conduct an evidentiary hearing on the issue of equitable relief, and agreed to submit the question of equitable relief to the Court on the record made at trial and on post-trial briefs. 653 F. Supp. at 652. In his opinion dated January 30, 1987, Judge Hart (1) denied defendant's

motions for judgment N.O.V. and new trial;[3] (2) set aside the jury's damage awards, holding that the defendants were entitled to qualified immunity from damages;[4] and (3) entered an injunction requiring the defendants (and their successors in office) to allow the members of the plaintiff class to exercise outside their cells at least five hours each week, and to shower at least three times each week, subject to exceptions contained in the Order.[5]

5. On appeal, petitioners challenged the district court's entry of the permanent injunction on the ground that the decree was based "upon improper and misstated findings" which "were 'clearly erroneous' within the meaning of Fed. R. Civ. P. 52(a)." Brief and Argument

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3 Defendants did not appeal from this decision.

4 Plaintiffs did not appeal from this decision.

5 Judge Hart's order is as follows:

"Except in temporary emergencies and institutional lockdowns, defendants Michael Lane and Michael O'Leary, and their successors in the offices of Director of the Illinois Department of Corrections and Warden of Stateville Correctional Center, shall provide every Stateville segregation inmate who has been confined in segregation for 90 or more consecutive days the opportunity to shower at least three times each week and to exercise outside of his cell at least five hours each week; *provided, however,* that if a segregation inmate violates prison rules during his exercise or shower period, he may be denied the exercise or shower rights provided herein for a reasonable period of time pursuant to regulation approved by this court; *provided, further,* that other reasonable exceptions to the shower and exercise rights established herein may be created pursuant to regulations approved by this court; *provided, further,* that instances of denial of minimum shower and exercise periods must be documented."

653 F. Supp. at 664.

for Defendants-Appellants 15. As the court of appeals noted, petitioners did *not* argue that the ultimate question in an Eighth Amendment case is a question of law for the judge to decide. App. 2. Nor did they ask for *de novo* review of the evidence.

After reviewing the record carefully, the Seventh Circuit, in an opinion by Judge Richard Posner, held that there was ample evidence to justify the district court's decree with respect to the exercise issue. "Confinement in Stateville's segregation unit involves considerable isolation, sometimes for protracted periods; and the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." App. 5. "With only one hour of exercise outside the cell a week and only two other hours outside the cell, an inmate spends 165 out of 168 hours in a 90-square-foot cage. That is too little, or so at least the district judge could find without committing a clear error." App. 8.

Judge Posner took a different view on the shower issue, holding that the district court's finding of fact on that matter was clearly erroneous. Again Judge Posner reviewed the record carefully and even went beyond it to take judicial notice of the state of the academic literature on the subject.

> While there is plenty of medical and psychological literature concerning the ill effects of solitary confinement (of which segregation is a variant), see, e.g., Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450 (1983), we have not found any corresponding literature on the effects

of limiting the number of showers that prisoners may take.

App. 11. Accordingly, the court of appeals vacated the portion of the district court's decree requiring more shower opportunities for segregation inmates.

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## REASONS FOR DENYING THE PETITION

Petitioners ask this Court to grant certiorari on the question: "Whether the determination that conditions of incarceration violate the Eighth Amendment's proscription against cruel and unusual punishment is a question of law subject to *de novo* review by a court of appeals." For a number of reasons, this question is not appropriate for certiorari review.

1. Petitioners are challenging a decision which the Seventh Circuit never made, on an issue which they never raised. The court of appeals did not hold that cruel and unusual punishment was a question of fact. Nor did the court of appeals hold that cruel and unusual punishment was a question of law. The Seventh Circuit simply said that since petitioners had conceded that cruel and unusual punishment was a question of fact it would be treated as such for purposes of this appeal. The statement has no precedential effect beyond this case. It was simply a passing observation that petitioners had waived a possible argument.

Besides being waived the argument that petitioners now seek to advance is purely academic; it has no bearing

on the outcome of the present case. Petitioners argue that the Seventh Circuit properly reviewed the district court's subsidiary findings of fact under the clearly erroneous standard, but should have exercised its own independent judgment on the ultimate fact of whether those subsidiary findings added up to cruel and unusual punishment. Petitioners reason that "[o]nce the subsidiary facts of the conditions of incarceration have been found, the ultimate question of whether such conditions are unconstitutional is unrelated to witness credibility." Petition for Certiorari 8.

This distinction between subsidiary and ultimate facts may be of practical significance in some cases, but it is not here. Petitioners have never denied that the district court's "subsidiary" factual findings, if correct, justify the conclusion that the Eighth Amendment was violated. The district court found these "subsidiary" facts:

1. "that limiting inmates to one hour per week of out-of-cell exercise is 'medically unacceptable' because it can lead to deterioration of the cardiovascular system, hardening of the arteries, atrophy of muscles, musculo-skeletal problems, and adverse psychological effects." App. 24.
2. that inmates in Stateville's segregation unit "were less healthy than inmates in the general population." App. 23.
3. "that Stateville's segregation unit allows inmates far less out-of-cell exercise than other segregation units in maximum security prisons." App. 24.
4. that "no other prison in a civilized country," known to the experts who testified at trial, "limits inmates to one hour of exercise per week." App. 24-25.

5. "that limiting inmates to one hour per week of out-of-cell exercise carries grave risks with no penological justification." App. 24.

6. "that there is a correlation, noted in the professional literature, between prolonged isolation and various psychopathological symptoms." App. 24.

7. that the named plaintiffs experienced medical and psychological ill effects while in segregation and "witnessed bizarre and self-destructive behavior of other inmates in segregation." App. 23.

8. that the denial of adequate out-of-cell exercise "was medically unacceptable and created a substantial threat of mental and physical injury to inmates." App. 28.

Although petitioners vehemently attacked these subsidiary findings, they always acknowledged that the findings, if true, would add up to cruel and unusual punishment. That ultimate issue—whether it be one of law or fact—was never in dispute. While the proper classification of this ultimate issue as a question of law or a question of fact (the question on which petitioners seek certiorari) may be an interesting academic exercise, its resolution has no bearing on the outcome of this case.

Moreover, the court of appeals did exercise its independent judgment on whether the district court's subsidiary findings of fact added up to a constitutional violation. To the extent there was any deference, it was to the district court's findings of the underlying facts—a deference that petitioners have always acknowledged as proper.

2. Certiorari should also be denied because, as the court of appeals found, petitioners waived the argument that cruel and unusual punishment is a question of law,

rather than a question of fact. In the lower courts, petitioners consistently argued that cruel and unusual punishment is a question of fact. Indeed, they were the ones who wanted the question submitted to a jury, and they proposed jury instructions defining cruel and unusual punishment (which Judge Hart gave in substance). Moreover, petitioners never asked for *de novo* review of the evidence. Rather, they sought review under some form of a clearly erroneous standard.

In their post-trial JNOV motion, for example, petitioners argued that the "jury's verdict was contrary to the clear weight of the evidence." Defendants' Memorandum of Law in Support of Motion for Directed Verdict, Judgment Notwithstanding the Verdict or in the Alternative, New Trial 4. Petitioners went on:

> The standards applicable to a motion for directed verdict and judgment notwithstanding the verdict are the same. All the evidence, taken as a whole, must be viewed in the light most favorable to the nonmoving party. This evidence must provide a sufficient basis from which the jury could have reasonably reached a verdict without speculation or drawing unreasonable inferences which conflict with the undisputed facts.

*Id.* at 4.

> The existence of a mere scintilla of evidence supporting plaintiff's position is insufficient. . . . There must exist evidence on which the jury could reasonably find for plaintiff.

*Id.* at 5.

> There was absolutely no evidence from which a jury could reasonably have determined that defendants[']policies caused the unne[ce]ssary and wanton

> infliction of pain on plaintiffs. Such a determination could only be based on speculation or conjecture.

*Id.* at 10.

> Construed in the light most favorable to plaintiffs, the evidence establishes that the segregation conditions might cause psychological harm.

*Id.* at 14.

> The question is whether plaintiffs put in enough evidence to justify the jury's special verdict. . . . Once again, the evidence and all reasonable inferences drawn therefrom, viewed in the light most favorable to plaintiff is such that reasonable persons could not have reached different conclusions based on the quality and quantity of evidence required.

*Id.* at 15.

> [T]he jury's findings of a constitutional violation, actual injury, and punitive damages are all contrary to the clear weight of the evidence.

*Id.* at 21.

In the Seventh Circuit, defendants argued that the district court's findings of fact were clearly erroneous and therefore did not support its conclusion that petitioners subjected respondents to cruel and unusual punishment. Defendants did not argue that the findings of fact, if true, failed to add up to a constitutional violation. Nor did they ask the Seventh Circuit to review the underlying evidence on a *de novo* basis. *See* Brief and Argument for Defendants-Appellants:

> The district court found that the legal issues herein are extremely fact-bound. 653 F. Supp. 649, 662. The decision of the district court rests upon generalized findings of fact relating to conditions as they had previously existed and as they presently exist at State-

> ville Correctional Center. The Defendants contend that the district court's conclusions of law as to the ultimate issues in this case are based upon improper and misstated findings. As such, those findings were 'clearly erroneous' wtihin the meaning of Fed. R. Civ. P. 52(a).

*Id.* at 14-15.

> The district court failed to make one positive finding with regard to I-House but focused on plaintiffs' pejorative testimony, the personal opinions of experts, irrelevant evidence, and erroneous finding of fact.

*Id.* at 26.

> There was substantial evidence presented which was ignored or misstated throughout the court's fact-finding process. Thus, the court's findings are clearly erroneous.

*Id.* at 46.

Petitioners cannot complain in this Court that the lower courts followed the standard of review which petitioners asked them to use, rather than some other not-quite-specified standard of review which petitioners never asked them to use. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe,* 107 S. Ct. 1114, 1115 (1987); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981) ("[a]lthough defendant's petition for certiorari presented the question of the District Judge's abuse of discretion . . . that question was not raised in the Court of Appeals and is not properly before us").

3. Petitioners also seek certiorari on whether the Seventh Circuit properly found that petitioners had waived the argument that cruel and unusual punishment

is a question of law by consistently taking the opposite position. This question is not worthy of the Court's attention since it has no significance beyond the present case and, indeed, has no practical importance in this case either. Besides, the court of appeals' finding of waiver was correct.

Moreover, despite petitioners' concession, the Seventh Circuit did in fact conduct a searching review of the record, and indeed went beyond the record to survey the professional literature and the case law in the area. The court of appeals did not hesitate, after this review, to hold the district court's findings on the shower issue to be clearly erroneous. On the exercise issue, Judge Posner held that the district court findings as to the harmfulness of petitioners' exercise policies were supported by the record, the case law and the professional literature and "anyway seem[ed] pretty obvious." App. 5.

4. Finally, petitioners seek certiorari on the question: "Whether petitioners denied respondents their right to be free from cruel and unusual punishment under the Eighth Amendment as a matter of law." Petitioners present no reasons why this Court should consider that question, and may have abandoned the point. In any event, Judge Posner's opinion explains why there was a constitutional violation and his opinion is consistent with a host of other lower court decisions. *See, e.g., French v. Owens,* 777 F.2d 1250, 1255-56 (7th Cir. 1985), *cert. denied,* 107 S. Ct. 77 (1986); *Ruiz v. Estelle,* 679 F.2d 1115, 1151-52 (5th Cir. 1982), *cert. denied,* 460 U.S. 1042 (1983); *Campbell v. Cauthron,* 623 F.2d 503, 507 (8th Cir. 1980) (pretrial detainees); *Spain v. Procunier,* 600 F.2d 189, 199-200

(9th Cir. 1979); *Sweet v. South Carolina Dep't of Corrections,* 529 F.2d 854, 865-66 (4th Cir. 1975); *Frazier v. Ward,* 426 F. Supp. 1354, 1367-69 (N.D.N.Y. 1977).

## CONCLUSION

Because of the foregoing the petition for a writ of certiorari should be denied.

Respectfully submitted,

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